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Striking a Balance: The Need to Temper Judicial Discretion against a Background of Legislative Interest in Federal Sentencing

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Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing

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In the last thirty years, sentencing in the federal criminal system has undergone significant legislative and judicial change. From a system of nearly complete judicial discretion, to a system of rigid guidelines, to a system that lies somewhere in between, federal sentencing has challenged judges to adapt their procedures for sentencing and their understanding of their own role in the process. In today's post-*Booker* world, sentencing judges face the new challenge of considering how much discretion is too much. Must they temper their own preferences when sentencing defendants, or have the Supreme Court's most recent rulings allowed them the free rein they once enjoyed in the pre-Guidelines world? This article attempts to address those concerns and suggests that, while discretion in sentencing is key to fair and just sentences, in today's climate with intense legislative interest in sentencing, judges must use that discretion judiciously or else run the risk of being forced into an era of mandatory minimums and determinate sentences, which could stifle discretion even more than the United States Sentencing Guidelines.

Part I of this article undertakes a brief historical overview of sentencing in the United States, focusing in particular on how the use—or overuse—of judicial discretion shaped sentencing policy. Part II discusses the sweeping changes that took place in the last seven years based on *Apprendi v. New Jersey*,[1] *Blakely v. Washington*,[2] and *United States v. Booker*.[3] Part III focuses on current sentencing trends post-*Booker*, and Part IV sets forth my proposal for tempered judicial discretion, focusing on striking the right bal-

1. 530 U.S. 466 (2000).
2. 542 U.S. 296 (2004).
3. 543 U.S. 220 (2005).

ance between the need for judicial discretion and the recognition of the balance of power between the three branches of the government.

I. JUDICIAL DISCRETION IN SENTENCING: A HISTORICAL PERSPECTIVE

A. The Growth of Indeterminate Sentencing

The Sentencing Guidelines did not arise as a flight of Congressional fancy. Rather, they developed from a concern, which began in the early 1970s, that indeterminate judicial sentencing was leading to unjust results. In the early days of the Nation's history, sentencing judges and prison systems included punishment as a goal of imprisonment. However, by the time the 20th Century began, the focus of most American prison reformers and, soon, prisons themselves, was rehabilitation.[4] Picking up on this societal norm, in 1949 the Supreme Court noted that rehabilitation had replaced punishment and revenge as the primary purpose of imprisonment: "[r]etribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[5]

In order to achieve the goals of rehabilitation and reformation, sentencing judges required a considerable amount of discretion. Because each criminal was unique and required a unique punishment in order to be rehabilitated, strictly delineated sentences simply would not do. "In the view of proponents of rehabilitation, the duration of imprisonment, whatever the crime, 'should not be for weeks, months or years, but until that end for which alone [an offender] should be put [in prison] is accomplished; that is, until reformation has evidently been affected [sic].'"[6] If the legislature mandated particular sentences for particular crimes, a criminal might be released before he was rehabilitated or spend time in prison well after his rehabilitation was complete. In order to prevent this, sentences had to be tailored to the particular criminal then before the court. Therefore, between 1880 and 1911, twenty-

4. Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, *in* 3 CRIMINAL JUSTICE 2000 109, 111 (Julie Horney et al. eds., 2000).

5. Williams v. New York, 337 U.S. 241, 248 (1949).

6. KATIE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 17 (1998) (alteration in original) (quoting 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (Wayne L. Morse et al. eds., 1939)).

eight states passed indeterminate sentencing laws.[7] By the 1960s, every state in the nation had some form of indeterminate sentencing.[8]

B. The Replacement of Indeterminate Sentencing

Indeterminacy's dominance over the American judicial system, however, was not to be permanent. As the 1970s dawned, critics began to point out flaws in the indeterminate sentencing systems that were in effect in all parts of the country. Critics' objections were twofold: first, rehabilitation simply had not been effectuated by indeterminate sentencing, and second, criminals were facing vastly different sentences for the same crimes. Critics, such as Robert Martinson in his famous article *What Works?*,[9] debunked the idea that imprisonment had any rehabilitative effects. "[W]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[10] Despite continuing efforts to rehabilitate criminals, studies found that most returned to a life of crime after release.[11]

However, the failure of indeterminate sentencing did not end with its failure to reach its stated goal. Rather, a second, and perhaps more disturbing, flaw was uncovered. Criminals who had engaged in substantially similar behavior and had substantially similar criminal histories faced dramatically different sentences depending on which court passed judgment. As Judge Marvin Frankel pointed out, "[t]he result . . . is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[12] The federal system, like most state systems at the time, simply prescribed a range of punishment—five years to life, for example. However, it gave no indication as to where within that vast range a particular kind of defendant should be sentenced, leading to the noticeable disparities in sentences. "The broad statutory ranges might approach a degree of ordered rationality if there were prescribed any standards for locating a particular case within any range. But neither our federal

7. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894 (1990).

8. *Id.*; *see also Williams*, 337 U.S. at 247 ("Indeterminate sentences . . . have to a large extent taken the place of old rigidly fixed punishments.").

9. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

10. *Id.* at 25.

11. *Id.* at 49.

12. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 7 (1973).

law nor that of any state I know contains meaningful criteria for this purpose."[13] The concern over disparity was not simply an academic debate, but rather a problem vocalized by academics,[14] lawmakers,[15] and judges.[16]

By the mid-1970s, the states were responding to such concerns by enacting sentencing systems that removed at least some discretion from judges. By 1984, fifteen states' criminal codes had undergone significant revisions that resulted in determinate sentencing.[17] For example, until 1978, the State of Arizona had a primarily indeterminate sentencing system. After a 1977 pilot program of sentencing guidelines in Maricopa County (where Phoenix is located), the Arizona legislature passed laws that created a presumptive sentencing system.[18] The system created six classes of felonies and three classes of misdemeanors, with each class having a maximum and minimum sentence. Under the system, there was a definite term that was "presumed" to be the appropriate sentence. Deviations from the presumed sentence were then determined by the classification of the felony and the "dangerous" or "non-dangerous" nature of the criminal.[19] Such a system removed a significant amount of discretion from the sentencing judge and made predicting the sentence for a particular criminal more a matter of computation than crystal-ball gazing.

C. Federal Sentencing Reform

The federal government responded in kind. In 1966, at the urging of President Lyndon B. Johnson, Congress created the National Commission on Reform of the Federal Criminal Laws, better known as "the Brown Commission."[20] After the Brown Commission's 1971 report indicated that "sentencing disparities were

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13. *Id.*

14. *See, e.g.*, PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964).

15. *See, e.g.*, S. REP. NO. 98-225, at 65 (1984).

16. *See* FRANKEL, *supra* note 12.

17. Arizona, California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Tennessee, and Washington. SHANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 282–85 (1985).

18. *Id.* at 23-24.

19. *Id.* at 24.

20. *See* Joseph F. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1340 & n.54 (1999).

large and pervasive,"[21] Congress began to investigate ways to change the federal criminal code. Prior to Congressional revisions, the federal criminal code was created through an ad hoc process of piling one statute on top of another.[22] The result was a code that was often difficult to access and sentences that were nearly impossible to predict.[23]

In response, Senator Edward Kennedy introduced Senate Bill 2699, which would have created a federal sentencing commission and reduced the number of statutory minimums then included in the federal criminal code.[24] That bill failed to get the necessary support, and in the next several years, a number of other bills pushing for sentencing reform would fail to proceed past committee or be rejected once they reached the floor.[25] Finally, in 1984, President Ronald Reagan signed the Comprehensive Crime Control Act into law.[26] The Act created the Federal Sentencing Commission, a first step toward the creation of the United States Sentencing Guidelines. Following the passage of the Comprehensive Crime Control Act, Congress successfully passed the Sentencing Reform Act of 1984,[27] with the goals of reducing unwarranted disparity in sentences,[28] assuring the certainty and severity of punishment, and increasing the rationality and transparency of punishment.[29]

D. Federal Sentencing After 1984

Following the enactment of the Sentencing Reform Act, federal courts began the difficult task of learning and applying the newly

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21. *Id.* at 1340.

22. *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 88-114 (1998).

23. *See* Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 526 (1955) ("As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and the new that only history explains.").

24. S. 2699, 94th Cong. (1975).

25. *See, e.g.*, S. 1437, 95th Cong. (1978) (bill introduced by Senators Kennedy and McClellan calling for the re-codification of criminal laws, restrictions on parole, and the establishment of sentencing commission that did not make it out of committee); Criminal Code Reform Act of 1979, S. 1722, 96th Cong. (1980) (similar bill to S. 1437 that was not enacted); S. 2572, 97th Cong. (1982) (comprehensive criminal code revision that passed the Senate, but was deleted from a completed bill by the House).

26. S. 1762, 98th Cong. (1983); S. 668, 98th Cong. (1983).

27. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–86 & 28 U.S.C. §§ 991–98).

28. *See* 28 U.S.C. § 991(b)(1)(B) (2000); S. REP. NO. 98-225, at 41-46 (1984).

29. *See* 28 U.S.C. §§ 991(b)(1)(C), 991(b)(2), 3553(c) (2000 & Supp. V 2005).

created Guidelines. As written, the Guidelines create a "base offense level" for each crime delineated in the United States Code.[30] Beginning with that base offense level, an offender's total offense level is then calculated based on a number of factors, including the impact on the victim,[31] the nature of the offender, his role in the offense, and any subsequent conduct on his part.[32] Such findings are undertaken by the district court using a preponderance of the evidence standard.[33] The sentencing court must then determine the offender's criminal history.[34] Based on these determinations, the sentencing court calculates the offender's total Guidelines range.[35] Upon motion by the offender or the government, the sentencing court may depart from the Guidelines range under certain carefully delineated circumstances,[36] such as acceptance of responsibility.[37] The court is also granted the authority to grant upward or downward departures from the Guidelines based on other circumstances not taken into consideration in the Guidelines.[38] However, these kinds of departures may only be applied in very limited circumstances, in the "exceptional case" when the Guidelines do not take the circumstances into consideration in any form.[39]

Under the Sentencing Reform Act as it existed until recently, district courts had virtually no discretion other than to choose a sentence from within the Guidelines range, which could present a difference of six to eighty-one months between the Guidelines minimum and maximum, depending on the Guidelines range.[40] Imposition of a sentence within the Guidelines range was mandatory.[41] Courts of appeals exercised plenary review over a district court's calculation of a sentence,[42] giving due regard to the district

30. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b) (2006) (hereinafter GUIDELINES); *see also generally id.* ch. 2 (delineating the base offense level for each violation of the United States Code).
31. *Id.* §§ 3A1.1–1.3.
32. *Id.* §§ 3B1.1–1.5, 3C1.1–1.4, 3E1.1.
33. *Id.* § 6A1.3 cmt.
34. *Id.* ch. 4.
35. GUIDELINES, *supra* note 30, § 5A.
36. *See generally id.* § 5K.
37. *Id.* § 5K1.1.
38. *Id.* § 5K2.0(a)(2)(B).
39. *Id.*
40. *See* Sentencing Table, GUIDELINES, *supra* note 30, § 5A.
41. 18 U.S.C. § 3553(b)(1) (Supp. V 2005).
42. *Id.* § 3742(e).

court's determinations regarding credibility and overturning factual findings only where there was clear error.[43]

The benefits of such a system of limited discretion were clear. The first, and most obvious, benefit was the reduction in sentencing disparity. As indicated by the Sentencing Reform Act itself, the Guidelines aimed "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[44] This focus on reducing disparity arose, in part, from a fear that the continuation of unequal punishment would result in diminished respect for the law. As the Twentieth Century Fund Task Force on Criminal Sentencing stated, "[w]here equal treatment is not the rule, potential offenders are encouraged to play the odds, believing that they too will be among the large group that escapes serious sanction."[45] With a system of Sentencing Guidelines, defendants could predict, with some certainty, what sort of sentence they would receive for their crime regardless of the judge that imposed the sentence, thereby reducing the likelihood of benefitting from gambling with the system.

In addition to preventing defendants from gambling with the system, the more uniform approach created predictability and fairness. Defendants, regardless of race or financial situation, faced approximately the same, predictable sentence if they committed sufficiently similar crimes. While this need to eliminate unwarranted sentencing disparities was the primary focus of the Sentencing Reform Act, the system of limited discretion that the Act created came with other benefits as well.[46] To some degree, the Sentencing Reform Act reduced irrationality in sentencing.[47] The Guidelines attempt to punish the most serious crimes the most severely.

However, as the federal judiciary settled into the Guidelines system, criticism inevitably arose. As an initial matter, critics claimed that the Guidelines were simply too unwieldy and com-

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43. *Id.*

44. *Id.* § 3553(a)(6) (2000).

45. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 6 (1976).

46. Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295-96 (1993).

47. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 397 (2005) ("With varying degrees of success, sentencing guidelines appear to have reduced unwarranted disparity and brought a degree of rationality to sentencing.").

plex.[48] In addition to arguing that this complexity led to an inability to properly understand and apply the Guidelines, critics also argued that their great complexity led to "unreasonable rigidity" and was "a primary cause of an increasing institutional imbalance in both the rulemaking and individual case."[49]

Further, critics attacked the Guidelines' tendency to move discretion away from judges and towards federal prosecutors. Under the Guidelines system, United States Attorneys and their assistants retained the power not only to decide with what crime a defendant would be charged, but also what kinds of sentencing factors he or she would choose to prove at sentencing.[50] Therefore, depending on which federal prosecutor prosecuted a particular case, a defendant could face a very different sentence, resulting in the very disparity the Sentencing Reform Act sought to eliminate.[51]

In addition to these general concerns, the judiciary itself faced challenges when applying the Guidelines. Congressional involvement in the sentencing process, it was argued, resulted in punishments that were simply too severe for particular kinds of criminal conduct.[52] However, because of the rigid nature of the Guidelines, judges lacked the ability to mold sentences to fit the seriousness of a particular offense.[53] This problem was exacerbated by the limitations on the ways in which a judge could sentence a defendant outside of the Guidelines. Unless the Guidelines provided for a departure from a Guidelines sentence, such as

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48. *See* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 327-34 (2000) (discussing criticism of the Guidelines for being too complex).

49. Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 169 (2005).

50. *See generally* William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309 (1993) (discussing the numerous decisions federal prosecutors make when charging a defendant and arguing for a proper sentence).

51. Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908-09 (2005) (attributing punishment disparities to prosecutorial charging decisions).

52. Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*, 5-6 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$file/gssurvey.pdf; *but see generally* Paul Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004) (arguing that the Guidelines are not too severe).

53. One survey indicated that as many as forty-five percent of Article III judges believed that the Guidelines were too inflexible. Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENT'G REP. 215, 215-16 (2003), *available at* http://www.ussc.gov/judsurv/judsurv.htm.

a substantial assistance departure,[54] judges could only depart from the Guidelines range under extraordinary circumstances.[55] Any such determination was reviewed de novo by an appellate court.[56]

Despite these real concerns about the Guidelines, they remained virtually untouched by legal challenges for the first twenty years of their existence. Constitutional challenges failed,[57] and the Guidelines remained basically unchanged.[58]

II. *APPRENDI, BLAKELY, BOOKER,* AND THE RETURN OF JUDICIAL DISCRETION

However, as the century turned, new jurisprudence emerged that would change the landscape of federal sentencing forever. *Apprendi v. New Jersey*, issued June 26, 2000, reiterated the phrase penned in *Jones v. United States* that would find its way into so many judicial opinions to follow:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[59]

But what this phrase could mean for federal sentencing did not become apparent until nearly four years later. In *Blakely v. Washington*, the Supreme Court invalidated, on Sixth Amendment grounds, Washington state's mandatory sentencing guidelines scheme.[60] The Supreme Court held that, for purposes of *Apprendi*, the statutory maximum was that set by the guidelines, not that included in the definition of the crime.[61] Therefore, when a

54. GUIDELINES, *supra* note 30, § 5K1.1.

55. *Id.* § 5K2.0.

56. 18 U.S.C. § 3742(e) (2000 & Supp. V 2005).

57. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (finding that the Guidelines did not violate the constitutionally based nondelegation doctrine).

58. In 2003, Congress did undertake some substantial changes to the Guidelines. Known as the Feeney Amendment to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), the 2003 changes attempted to discourage downward departures. Pub. L. No. 108-21, § 401, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C.).

59. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

60. 542 U.S. 296 (2004).

61. *Blakely*, 542 U.S. at 303-04.

judge found facts by a preponderance of the evidence that increased a defendant's sentence beyond that set by the Guidelines, he violated the defendant's Sixth Amendment right to a jury trial.[62]

Not sixth months later, the final hammer stroke fell in *United States v. Booker*.[63] In order to address whether the Supreme Court's holding in *Blakely* would affect the Federal Sentencing Guidelines, the Supreme Court granted certiorari on two related cases: *United States v. Booker* and *United States v. Fanfan*.[64] With *Booker*,[65] the Supreme Court put to rest the last of the questions about the constitutionality of the Federal Sentencing Guidelines. As written, the Guidelines violated a defendant's Sixth Amendment rights.[66] Under the Guidelines as they existed in January 2005, if a federal judge made no findings of fact beyond those made by the jury, he would have been required to impose a certain sentence that was mandated by the Guidelines. Therefore, any time he made additional factual findings, such as drug quantity, that a gun had been used in the crime, or that a person had been injured, the judge made findings beyond those proved to a jury or admitted by a defendant. Such findings increased the term to which a defendant could be sentenced.[67] This operation of the Guidelines violated the exact language cited in *Apprendi* that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[68]

In the remedial portion of the opinion, the Supreme Court determined that, rather than have the entire scheme held unconstitutional or graft a jury requirement onto each fact that affected a Guidelines sentence, Congress would prefer that the unconstitutional portions be excised.[69] Therefore, §§ 3553(b)(1) and 3742(e) were removed from the Guidelines. By excising § 3553(b)(1), which stated that "[e]xcept as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred

62. *Id.* at 304-05.
63. 543 U.S. 220 (2005).
64. *Booker, cert. granted,* 542 U.S. 956 (2004); *Fanfan, cert. granted,* 542 U.S. 956 (2004).
65. As a matter of references, the two cases are generally referred to by the single name, *Booker*.
66. *Booker*, 543 U.S. at 248.
67. *Id.* at 333-34.
68. *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).
69. *Booker*, 543 U.S. at 248-49.

to in subsection (a)(4) [the applicable Guidelines range]," *Booker* rendered the Guidelines effectively advisory, taking them outside the scope of *Apprendi*.[70] The Guidelines would remain otherwise intact, and sentencing judges would still be required to consider them.[71] They would simply not be mandatory.[72] Rather, the Guidelines would serve as just one of the seven factors set forth at 18 U.S.C. § 3553(a) that district courts should consider when imposing a sentence.

However, excision of § 3553(b)(1) alone was not sufficient. In order to render the Guidelines truly advisory, the provision of the Guidelines that set forth the standard for appellate review also had to be excised. Section 3742(e) had previously provided that courts of appeals were to review a district court's determination of a sentence de novo, overturning such a sentence if it was imposed based on improper calculation of the Guidelines or in violation of law,[73] and § 3742(e) contained "critical cross-references" to §

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70. *Id.* at 259.
71. *Id.* at 259-60.
72. *Id.*
73. 18 U.S.C. § 3742(e) (2000 & Supp. V 2005). The entire provision read:

> (e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—
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> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and
>
> (A) the district court failed to provide the written statement of reasons required by section 3553(c);
>
> (B) the sentence departs from the applicable guideline range based on a factor that—
>
> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b); or
>
> (iii) is not justified by the facts of the case; or
>
> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Id.

3553(b)(1).[74] Therefore, it, too, was removed. While it appeared that the excision of § 3742(e) left the courts of appeals with no standard of review, *Booker* held that there was an implicit standard of review contained in the newly revised Guidelines:[75]

> We infer appropriate review standards from related statutory language, the structure of the statute, and the "sound administration of justice." *Pierce* [*v. Underwood*, 487 U.S. 552,] 559-560, [(1988)]. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]." 18 U.S.C. § 3742(e)(3) (1994 ed.).[76]

From *Booker* onward, courts of appeals were no longer to review federal sentences de novo, but for reasonableness. While that may have appeared to be a resolution of the issue, rendering the Guidelines advisory was simply the first step in a judicial restructuring of sentencing and sentencing review. Beginning on January 17, 2005, district courts and courts of appeals began the challenging process of discerning how to sentence in an age of newfound discretion.

III. FEDERAL SENTENCING IN THE POST-*BOOKER* WORLD: THE CURRENT USE OF DISCRETION

The process of discerning how to sentence offenders has progressed rapidly in the nearly three years since *Booker* was decided. Both district courts and courts of appeals have made decisions about procedures to be used and the kinds of considerations that ought to factor into their sentencing decisions. A review of current sentencing procedures highlights the ongoing attempts to decide how much discretion ought to be employed.

A. A Statistical Review of Sentences

In the post-*Booker* arena, defendants, on the whole, are facing similar sentences to those they faced before *Booker*. According to the most recent information from the United States Sentencing Commission, approximately sixty-one percent of defendants are

74. *Booker*, 543 U.S at 260.
75. *Id.*
76. *Id.* at 260-61.

sentenced within the advisory Guidelines range.[77] This number is about a four-percent change from the sixty-five percent of sentences that were reported within the Guidelines range for 2002, before *Booker* was decided.[78] While the change is noticeable, it does not reflect the fear of some post-*Booker* commentators that judges, now invested with a new kind of discretion, would ignore the Guidelines and sentence defendants however they saw fit. Rather, as before *Booker*, most defendants find themselves sentenced within the Guidelines range.

In addition, while there has been a slight increase in the number of sentences above the Guidelines,[79] the largest change appears to be in downward departures. According to one 2005 study, approximately 8.6 percent of below-Guidelines sentences could be attributed to *Booker*.[80] As was the case pre-*Booker*, a majority of below-Guidelines sentences are sponsored by the Government.[81] However, some district courts are imposing their own below-Guidelines sentences based on their newfound discretion.[82] But precisely how are district courts going about determining such sentences?

B. District Court Procedures for Outside-of-Guidelines Sentences

How a district court should go about granting an outside-of-Guidelines sentence is a topic that has merited much discussion in the courts of appeals. In order to discuss the division between the courts of appeals, I will adopt the nomenclature of "departures" and "variances." Under this description of things, "departures" are those additions or reductions that occur within the Guidelines system but that take a sentence outside of the Guidelines range. These kinds of departures include delineated departures, such as acceptance of responsibility and substantial assistance,[83] and non-delineated departures considered at Guidelines section 5K2.0.[84]

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77. U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT [hereinafter QUARTERLY REPORT] 1 tbl.1 (2007), *available at* http://www.ussc.gov/sc_cases/Quarter_Report_1Qrt_07.pdf.

78. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING STATISTICS REPORT FOR FISCAL YEAR 2002, tbl.8, *available at* http://www.ussc.gov/JUDPACK/JP2002.htm.

79. According to a recent article, the change in above-the-Guidelines sentences has been approximately one percent. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 731 (2005).

80. *Id.*

81. QUARTERLY REPORT, *supra* note 77, at 1 tbl.1.

82. Klein, *supra* note 79, at 726-30.

83. GUIDELINES, *supra* note 30, § 5K1.1.

84. *Id.* § 5K2.0.

Variances, however, are changes in sentences based, not on the Guidelines themselves, but on the factors set forth in 18 U.S.C. § 3553(a). For example, they may be based on an offender characteristic that is not considered in the Guidelines but that can be considered under § 3553(a)(1).

Depending on which court of appeals sits over the sentencing court, defendants may face very different procedures and review if they are granted a departure rather than a variance. As indicated by Congress, Guidelines departures should be rare. "Under [the] guideline sentencing system, the judge should be able to sentence outside the guideline range in unusual circumstances, but should . . . give reasons for such a sentence."[85] Such departures must be fully justified, and appellate courts will review them de novo, as they would any Guidelines calculation.[86] In addition, before a district court can make such a departure, it must notify the defendant of the possible grounds for departure pursuant to Federal Rule of Criminal Procedure 32(h).

However, if the defendant's sentence is changed by a variance, the district court need not have an extraordinary reason. Rather, such sentences do not require the same justification as departures and are subject only to reasonableness review by the courts of appeals.[87] In addition, depending on which circuit a court is in, a defendant may not receive notice of the grounds for such a below-Guidelines or above-Guidelines variance.[88] The lack of a notice requirement and the fact that a variance is often more easily justified than a departure have led some courts to indicate that Guidelines departures are "obsolete."[89]

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85. STAFF OF SUBCOMM. ON CRIMINAL JUSTICE, H. COMM. ON THE JUDICIARY, 97TH CONG., FEDERAL CRIMINAL LAW REVISION: HEARINGS ON H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, AND H.R. 5703, at 8 (Comm. Print 1983).

86. GUIDELINES, *supra* note 30, § 5K2.0 (stating that departures are to be granted only in rare circumstances); *see also* United States v. Grier, 475 F.3d 556, 570 (3d Cir. 2007) (en banc) (stating that court of appeals will continue to exercise plenary review over a district court's application of the Guidelines); United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (stating district courts must still rule on departures as they would have under the pre-*Booker* regime).

87. United States v. Walker, 447 F.3d 999, 1007-08 (7th Cir. 2006).

88. *See, e.g.*, United States v. Levine, 477 F.3d 596, 606 (8th Cir. 2007) (holding that notice under 32(h) is not required for variances based on § 3553(a) factors); United States v. Vampire Nation, 451 F.3d 189, 197 (3d Cir. 2006) (same); *Walker*, 447 F.3d at 1007 (same); *but see* United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006) (holding that even variances under § 3553(a) require notice under 32(h)); United States v. Evans-Martinez, 448 F.3d 1163, 1164 (9th Cir. 2006) (same); United States v. Dozier, 444 F.3d 1215, 1218 (10th Cir. 2006) (same).

89. *E.g.*, *Walker*, 447 F.3d at 1006.

C. *Reviewing Discretionary Sentences at the Appellate Level*

Like district courts, appellate courts have adopted different approaches to reviewing sentences. While all agree that a district court must first properly calculate a Guidelines sentence and then impose a reasonable sentence, they do not always agree on how to determine whether a sentence is reasonable. The two primary grounds for disagreement, until recently at least, were the presumption of reasonableness and the relationship between the degree of variance and the strength of the district court's reasons. I will address each briefly.

In the wake of *Booker*, appellate courts have struggled to find a way to articulate what "reasonableness review" actually is, and to create a process by which appellate courts may review sentences for reasonableness. In response, a number of circuits adopted the rule that a within-Guidelines sentence is entitled to a rebuttable presumption of reasonableness.[90] Other circuits chose not to adopt such a presumption.[91] The disagreement centered around whether adopting such a presumption would make the Guidelines functionally mandatory and, therefore, violate *Booker*. The Supreme Court answered that question in the negative in *Rita v. United States*, holding that a court of appeals may—but is not required to—use a presumption of reasonableness when reviewing in-Guidelines sentences.[92] It stated that such presumptions are not binding, nor do they "reflect strong judicial deference of the kind that leads appeals courts to grant greater fact-finding leeway to an expert agency than to a district judge."[93] Instead, the presumption merely allows for the recognition that when a district judge applies an in-Guidelines sentence, both he and the Sentencing Commission have reached the same conclusion. "That double determination significantly increases the likelihood that the sentence is a reasonable one."[94] Because such a presumption applies

90. *E.g.*, United States v. Cage, 458 F.3d 537, 541 (6th Cir. 2006); United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Cawthorn, 429 F.3d 793, 802 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

91. United States v. Zavala, 443 F.3d 1165, 1171 (9th Cir. 2006); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006).

92. Rita v. United States, 127 S. Ct. 2456, 2462-63 (2007).

93. *Rita*, 127 S. Ct. at 2463.

94. *Id.*

only to appellate review,[95] it does not allow district courts simply to impose a Guidelines sentence without any further consideration. District courts must still consider the § 3553(a) factors and make a reasoned, discretionary decision about the appropriate sentence.

The Supreme Court's decision in *Rita* clearly reflects a respect for the Guidelines and the Sentencing Commission. But, at the same time, it recognizes that district courts have, and ought to use, discretion when making individual sentencing determinations.

The Supreme Court took up the second question of the deference to be accorded to the reasons given by the district courts in justifying a deviation from the Guidelines when they decided *Gall v. United States*.[96] This question went right to the core of reasonableness review, asking, as in *Rita,* what role the Guidelines are to play in determining whether a sentence is reasonable. The question was, if a district court deviates substantially, must the court articulate extraordinary circumstances? Or does such a requirement violate *Booker*? Courts of appeals were divided.[97] But the Supreme Court in *Gall,* reconfirming that the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, held that courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.[98] The Court went on to clarify that the appellate courts must first ensure that the district court made no significant procedural errors and then consider the sentence's substantive reasonableness under an abuse-of-discretion standard, giving due deference to the district court's decision that the § 3553(a) factors justify the variance.[99]

95. *Id.* at 2465.

96. 128 S. Ct. 586 (2007).

97. *See, e.g.*, United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (holding that an extraordinary deviation from the Guidelines must be justified by extraordinary circumstances); *but see* United States v. Jimenez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (stating that Guidelines cannot be given presumptive weight or be presumed presumptively correct).

98. *Gall*, 128 S. Ct. at 597.

99. *Id.*

IV. GUIDED DISCRETION: A PROPOSAL FOR THE FEDERAL JUDICIARY

A review of history and a survey of current federal sentencing practice leave us asking, now what? There exist a Congress with a substantial interest in ensuring that defendants are sentenced a certain way and a judiciary that has been reinvested with much of its historical discretion. The task that now faces that judiciary is to use its discretion in such a way as to respect congressional wishes, but not so much that it loses its ability to make case-by-case determinations. What I propose below is a type of guided discretion wherein federal judges will respect Congress' role in the sentencing process while using their discretion to sentence specific defendants based on defendants' personal characteristics and the circumstances of their offenses. However, before I address my proposal specifically, it is worthwhile to revisit the importance of the two interests at stake here: discretion and congressional guidance.

A. The Importance of Judicial Discretion in Sentencing

As history reveals, until the late 1900s, judicial discretion had been a key ingredient in sentencing, and for good reason. In any criminal justice system, discretion recognizes that individualized cases require individualized responses. For that reason, prosecutors retain discretion to mold general statutes to the needs of the real cases that they see, and judges historically were given the discretion to mold general criminal penalties to fit the real cases that came before them.[100] In sentencing, in particular, a judge requires discretion for two reasons: first, punishment is about more than simply retribution, and, second, offenders are people. I will address each of these in turn.

As the Sentencing Reform Act itself recognizes, punishment is about more than simply retribution. It also serves to deter both the individual and other future offenders, to protect the public, and to rehabilitate the offender.[101] These goals will not always

100. STITH & CABRANES, *supra* note 6, at 145 (1998).

101. *See* 18 U.S.C. § 3553(a)(2) (2000 & Supp. V 2005), which requires a sentencing judge to consider:

> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

apply to each offender in the same way. For example, let us consider two offenders being sentenced for the same crime: possession with intent to distribute cocaine.[102] One offender is selling cocaine in order to finance his own drug habit. The other is simply selling cocaine because it is easier money than working at the factory down the street. As between these two offenders, if treating the first offender's drug addiction is likely to prevent him from committing future crimes, rehabilitation will be a more important goal of punishment for that first offender than the second. Perhaps the second offender has been in and out of prison for years, indicating that protecting society and retribution are the primary purposes of punishing that second offender. With an appropriate amount of discretion, a sentencing judge could tailor each offender's sentence in such a way as to recognize these varied goals and their application to the offenders. With no discretion, judges are prevented from looking at an offender's individual characteristics and using those characteristics to apply punishment for an appropriate purpose.[103]

In addition to allowing judges to consider the purposes of sentencing, some measure of discretion recognizes that offenders are people. As Professor Ogletree points out, "it is a *person* who stands before the bar to accept the punishment imposed by the court."[104] Without discretion, it is only too easy for the sentencer to simply apply a formula to the *crime*, rather than to the *person*.[105] Discretion allows for the consideration of the personal characteristics of an offender—age, upbringing, health—and not simply the characteristics of the crime—amount of loss, role in the offense, etc. What this does is return a human element to the exercise of punishing.

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Id.

102. 21 U.S.C. §§ 841 (2000 & Supp. V 2005), 846 (2000).

103. Another example is provided by Prof. Charles Ogletree, Jr.: "An obvious example is the age of the offender. Because youths are less mature and responsible than adults, and hence less culpable for criminal conduct, retribution is a less defensible punishment objective than is rehabilitation with regard to youthful offenders." Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1958 (1988) (internal quotation marks and citations omitted).

104. *Id.* at 1953.

105. *See id.* at 1954 ("Thus, if one ignores every personal characteristic of the offender, other than those that appear to be aggravating factors of the crime, it is likely to lead to gross miscarriages of justice in individual cases.").

While discretion plays an important part in any criminal justice system, it has a very particular and important role in the current federal Guidelines system. The Guidelines begin with the "heartland" case—in other words, they start with the most typical case of each kind of crime they define. For example, Guidelines section 2J1.3 sets the base offense level for perjury at 14.[106] From that heartland case of perjury, a judge must increase the base offense level by eight if the perjury involved causing or threatening to cause physical injury or property damage in order to suborn perjury.[107] If the perjury resulted in substantial interference with the administration of justice, the judge is to increase the base offense level by three levels.[108]

However, not all perjury offenses are the same. Therefore, as commentators have suggested, while a base offense level of 14 may be the just punishment for most cases—those close to the heartland—it will not be a just punishment for cases that fall far outside the heartland (both more and less morally reprehensible offenses). As Stith and Cabranes say in their book, *Fear of Judging*, "the problem (again) is that if applying these distinguishing [sentencing] factors (and the relative weights assigned to them) yields the right sentence for one defendant, it will fail to yield the right sentence for any defendant who differs from the first in relevant ways not factored into the Guidelines."[109] The further outside the heartland case an offense is, the less likely that the Guidelines sentence will be just. Judicial discretion, however, can account for these differences. In fact, it is important for judges to retain discretion to consider offenses outside the heartland.

In addition to accounting for offenses outside the heartland offense contemplated by the Guidelines, discretion is also important in the federal Guidelines scheme to account for offender characteristics that the Guidelines do not consider. When charging the Sentencing Commission, Congress instructed that it take account, to the extent they were relevant, of the following factors: age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal

106. GUIDELINES, *supra* note 30, § 2J1.3.
107. *Id.* § 2J1.3(b)(1).
108. *Id.* § 2J1.3(b)(2).
109. STITH & CABRANES, *supra* note 6, at 124.

activity for a livelihood.[110] Of these suggested offender characteristics, the only ones that are taken into consideration in the Guidelines are criminal history, a defendant's reliance on criminal activity for his livelihood, and his acceptance of responsibility.[111] Allowing judges to retain some measure of discretion permits consideration of the factors the Sentencing Commission chose not to include in its Guidelines.

B. The Need for Balance

However, discretion needs to be exercised within set boundaries. This need for guided discretion is justified by a number of reasons: first, failure to balance discretion with guidance results in disparity; second, unfettered judicial discretion ignores that both the legislative and executive branches—elected representatives of the people—maintain a substantial interest in criminal sentences; and, third, failure to limit discretion may result in serious legislative backlash. I will address each of these concerns in turn.

1. The Need to Reduce Disparity

As Judge Marvin Frankel indicated in his influential book, *Criminal Sentences: Law Without Order*, allowing judges unfettered discretion results in disparity. Speaking of the sentencing practices of the 1970s, which left determining a sentence up to a judge, Judge Frankel described the difficulties of discretion with no guidance:

> Our practice in this country, of which I have complained at length, is to leave that ultimate question [of how long or severe a sentence should be] to the wide, largely unguided, unstandardized, usually unreviewable judgment of a single official, the trial judge. This means, naturally, that intermediate questions as to factors tending to mitigate or to aggravate are also for that individual's exclusive judgment. We allow him not merely to "weigh" the various elements that go into a sentence. Prior to that, we leave to his unfettered (and usually

110. 28 U.S.C. § 994(d)(1)–(10) (Supp. V 2005).

111. Ogletree, *supra* note 103, at 1953; *see also* STITH AND CABRANES, *supra* note 6, at 122 ("[The Guidelines] calculus adopts a narrow conception of the offender characteristics that are relevant to sentencing.").

unspoken) preferences the determination as to what factors ought to be considered at all, and in what direction.[112]

The result, as indicated by both history and statistical analysis, is disparity in sentences—the very disparity that the Guidelines attempted to address.

2. *Legislative and Executive Interest in Sentencing*

While disparity in sentences may be sufficient by itself to support the need for guided discretion, it remains only one of many reasons that discretion ought to be guided. A system of guided discretion ensures that the legislative and executive branches can share a role in sentencing. This is beneficial for two reasons. First, it allows elected individuals—who represent the interests of the general public—to offer their input on sentencing. Second, it puts the bulk of sentencing policy in the hands of the branch best equipped to deal with sentencing at a global level.

As evidenced by any number of legislative sentencing reforms,[113] Congress has a distinct interest in how and to what extent offenders are sentenced. This is so not merely because supporting legislative sentencing initiatives is a smart political move.[114] Rather, Congress is composed of elected individuals who represent a public that is interested in tougher criminal sanctions.[115] While the public may not always have the most educated ideas on the proper way to deal with crime,[116] elected representatives have a duty to respond to the needs of their constituents. For this reason alone, Congress has a duty to consider and an interest in how federal offenders are sentenced.

However, the need to respond to constituents is not the only reason Congress ought to play a role in federal sentencing. Questions of the proper apportionment of punishment are primarily

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112. FRANKEL, *supra* note 12, at 112.

113. *See, e.g.*, The PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C.).

114. *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1975 (2006) (stating that supporting tougher sentencing laws results in public support and the support of key interest groups).

115. *See* Sarah Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 25 n.8 (1997) (detailing a number of surveys which indicated that constituents believed legislatures needed to be tougher on crime).

116. *See id.* at 23-24.

legislative questions.[117] "Whatever our individual preferences may be, it is for the legislature in our system to decide and prescribe the legitimate bases for criminal sanctions."[118] While this has been historically true,[119] more than history supports the proposition that determining punishment on the grand scale is basically a legislative objective. The legislature, as elected representatives, is best situated to make broad value judgments and choose between competing social concerns when determining the kinds and lengths of sentences that ought to be applied to particular kinds of crimes and offenders.[120] Individual sentencing judges facing individual defendants are poorly suited to such a task. Therefore, allowing full judicial discretion would put policy decisions, which are best made by the legislature, into the wrong hands. By allowing Congress and the Sentencing Commission to guide judicial discretion, policy choices are made by Congress and then implemented on an individual basis by sentencing judges. Such a system recognizes the horizontal division of power between Congress, prosecutor, jury, and judge.[121]

3. *Legislative Backlash*

A final, and eminently practical, reason that judges should embrace a system of guided discretion is the simple wish to retain any discretion at all. An overuse of judicial discretion could result in individualized, circuit-by-circuit sentencing policy.[122] Such varied sentencing policy would be in direct contravention of the uniformity Congress sought to enforce through the enactment of the Guidelines. Further, an overuse of judicial discretion could result in sentences for offenders that fall significantly below or above the sentences that Congress and the Sentencing Commission find are appropriate for offenders committing certain kinds of crimes.

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117. Gore v. United States, 357 U.S. 386, 393 (1958).

118. FRANKEL, *supra* note 12, at 107; *see also* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 41 (2006) ("Legislatures and sentencing commissions define crimes and punishments ex ante . . . .").

119. *See Gore*, 357 U.S. at 393.

120. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1134 (2005).

121. *See* Berman & Bibas, *supra* note 118, at 41 (discussing the importance of balancing power in sentencing decisions between legislature, prosecutor, jury, and judge).

122. Craig Green, Booker *and* Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 419-20 (2005).

Such sentences may, as Professor Green suggests, "serve as the political tinder that sparks new legislative reform."[123]

As indicated by previous legislative enactments, such as the PROTECT Act,[124] Congress is not hesitant to react legislatively to either administrative or judicial sentencing decisions that it finds unacceptable.[125] What form such reform would take in response to an overuse of judicial discretion is unclear. It may come in the form of more mandatory minimums or a complete system of mandatory sentences. Regardless of its form, most commentators agree that if the judiciary takes its newfound discretion too far, Congress will act to limit that discretion.[126] Therefore, discretion that is appropriately guided by policy statements issued by Congress and the Sentencing Commission is more likely to result in a judiciary that retains its discretion, rather than one that is constrained by Congressionally imposed mandatory sentences.

C. So What Do Judges Do Now?

We've explored the importance of retaining both discretion and some method of congressional involvement in sentencing. The question that remains is this: what is the best way for the judiciary to go about sentencing so that it respects both the need for discretion and the need for congressional involvement? That question presents itself in different ways to judges at the district court level and those at the appellate level. However, judges at both levels must react to the *Booker* line of cases in such a way as to maintain that balance. The remainder of this article addresses ways to strike a compromise.

1. Balance at the District Court Level

The federal district courts face the first hurdle in sentencing: how to choose an appropriate sentence that looks to the individual defendant and still respects congressional involvement. My sug-

123. *Id.* at 422.

124. Pub. L. No. 108-21, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C.).

125. *See id.* § 104 ("*Notwithstanding any provision of law regarding the amendment of Sentencing Guidelines*, the United States Sentencing Commission is directed to amend the Sentencing Guidelines [to increase penalties for child kidnapping offenses].") (emphasis added).

126. *See* Norman C. Bay, *Prosecutorial Discretion in the Post-*Booker *World*, 37 MCGEORGE L. REV. 549, 569-70 (2006); Daniel E. Chatham, *Playing with Post-*Booker *Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 620 (2007).

gestion to district courts is simple: do what Congress and the Supreme Court have instructed. Use the factors set forth in 18 U.S.C. § 3553(a). Section 3553(a) instructs district courts to consider the following factors when imposing a sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements

> by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.[127]

Serious consideration of each of these factors affords a district court adequate opportunity both to assess the individual needs of the case presented to it and to reflect upon congressional mandates and policy statements.

a. Factors One, Two, and Three: The Use of Judicial Discretion

Factors one, two, and three offer district courts an opportunity to make truly individualized sentencing determinations, and district courts ought to take advantage of that opportunity. Factor one instructs district courts to consider the "nature and circumstances of the offense and the history and characteristics of the defendant."[128] Under this sentencing factor, district courts may consider all of the relevant offender and offense characteristics not considered by the Guidelines. As indicated above,[129] the Guidelines only consider a defendant's criminal history, his reliance on criminal activity for his livelihood, and his acceptance of responsi-

127. 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).
128. *Id.* § 3553(a)(1).
129. *See supra* notes 34-37, 110-11, and accompanying text.

bility.[130] However, other offender characteristics may play an important role in determining an appropriate sentence, including age, education, vocational skills, mental and emotional condition, physical condition, employment, and family and community ties.[131] Factor one's broad language of "characteristics of the defendant" allows for consideration of these characteristics in relevant cases.

Factor two addresses the need for a sentencing judge to consider the various purposes of sentencing and their application to each offender.[132] Section 3553(a)(2) asks district courts to consider various purposes when sentencing a defendant: retribution,[133] deterrence,[134] protection,[135] and rehabilitation.[136] This allows a district court to take consideration of which purposes of sentencing are most applicable to a given defendant. Take the previous example of the two defendants being sentenced for possession with intent to distribute.[137] Under factor two, a judge may consider that the defendant who distributes narcotics to pay for his own addiction may be better served by a sentence that focuses on treatment and rehabilitation than a defendant who sells simply for the money. Factor three furthers this exercise of discretion by requiring judges to consider what kinds of sentences—prison, fines, home detention, to name a few—are available for each crime.[138] In short, the first three factors listed in section 3553(a) require a district court to carefully consider the circumstances of each crime, the characteristics of individual offenders, and the application of each purpose of sentencing to the individual. This provides precisely the kind of discretion necessary for judges to respond to the individual cases that are presented to them.

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130. Ogletree, *supra* note 103, at 1953.

131. 28 U.S.C. §§ 944(d)(1)–(10) (2000).

132. 18 U.S.C. § 3553(a)(2) (Supp. V 2005).

133. *Id.* § 3553(a)(2)(A) (2000) (considering the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

134. *Id.* § 3553(a)(2)(B).

135. *Id.* § 3553(a)(2)(C).

136. *Id.* § 3553(a)(2)(D) (considering the need for the sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

137. *See supra* Section IV.A.

138. 18 U.S.C. § 3553(a)(3) (2000).

b. Factors Four, Five, and Six: Balancing Congressional Interest

However, a sentencing judge may not stop at factor three. The next three factors provide the vehicle by which a judge should consider congressional interest and intent in sentencing. Before addressing factors four and five, which require more in-depth discussion, a short note is in order regarding sentencing factor six,[139] which requires district courts to consider the need to avoid unwarranted sentencing disparities. As both Congress and the Sentencing Commission had this goal as a primary objective in passing the Sentencing Reform Act of 1984 and promulgating the Guidelines, serious consideration of this factor requires district courts to consider that the Guidelines represent the best attempt of an experienced group of individuals to reduce sentencing disparity. Therefore, consideration of factor six requires contemplating the Guidelines and, likely more often than not, imposing a sentence that falls within the range suggested therein. As to factors four and five, because much of the controversy in the sentencing arena has focused on the application of these two factors, each will be considered in turn.

18 U.S.C. § 3553(a)(5): Pertinent Policy Statements

As important as the advisory Guidelines range are any pertinent policy statements issued by the Sentencing Commission or Congress—factor five, considered at 18 U.S.C. § 3553(a)(5). The Sentencing Commission followed most Guidelines provisions with commentary that, in addition to suggesting circumstances that may warrant a departure, provide the judgment or reason underlying the enactment of that particular Guideline.[140] That commentary, as is the case with sections of the Guidelines Manual actually entitled "Policy Statement," serves to guide a court when making its sentencing decision.[141] For example, the commentary to Guidelines section 2M5.3, Providing Material Support to Designated Terrorist Organizations, suggests that penalties may need to be increased during a time of war,[142] indicating the Sentencing Commission's belief that such offenses during wartime are more

139. *Id.* § 3553(a)(6).
140. GUIDELINES, *supra* note 30, § 1B1.7.
141. *Id.*
142. *Id.* § 2M5.3 cmt. n.2(B).

serious than those that occur during a time of peace. Such policy statements clearly reflect Congress' and the Sentencing Commission's judgments on the type and length of sentences for particular types of offenses. These kinds of comments are important indicators that sentencing judges ought to seriously consider when imposing a sentence. And it is at this factor that sentencing courts face the strongest likelihood of overstepping the bounds of appropriate guided discretion.

I believe there are two different ways a sentencing court can go wrong at factor five. First, the court may simply overlook or disregard a policy statement. For example, in a recent case to come out of the United States Court of Appeals for the Third Circuit, *United States v. Tomko*,[143] the Third Circuit indicated that the district court's failure to consider pertinent policy statements for tax evasion formed part of the circuit court's basis for finding the ultimate sentence imposed unreasonable.[144] Because the Guidelines encouraged imprisonment for tax evaders, the district court's failure to consider such a policy statement added to the unreasonableness of its ultimate term of probation.[145] While it is true that a district court's failure to look to policy statements may not always result in an unreasonable sentence, the Third Circuit's reflection on the district court's failure to consider such statements is a good one. A district court does not act in isolation when sentencing a defendant. Rather, it is one of several actors that have a role and an interest in sentencing a defendant.[146] When a sentencing court fails, by oversight, to consider a policy statement from a key actor in the sentencing process, it acts without full information. And when it purposely ignores such a policy statement, it goes beyond its role as judge and becomes a policy maker itself.

This leads me to the more serious of the two ways in which a sentencing court can go wrong at factor five: it can expressly reject policy statements. By so doing, a sentencing court not only fails to recognize that it is but one of several actors in the sentencing

143. 498 F.3d 157 (3d Cir. 2007).

144. *Id.* at 161-64.

145. *Id.* *See also* United States v. Ture, 450 F.3d 352 (8th Cir. 2006). In *Ture*, like *Tomko*, the Eighth Circuit concluded that the District Court's failure to consider the Guideline's recommendation of prison time added to the ultimate unreasonableness of the defendant's sentence of probation.

146. Berman & Bibas, *supra* note 118, at 41 ("In other words, the state cannot impose punishment without the concurrence of numerous actors, and the system necessarily accommodates the wisdom of each.").

process, but it invites a congressional response that would remove all discretion.

18 U.S.C. § 3553(a)(4): the Advisory Guidelines Sentence

The factor that has generated perhaps the most controversy in its application since *Booker* is section 3553(a)(4)(i), which instructs a district court to consider "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . . ."[147] This factor remains in place following *Booker*, but courts are left wondering what role the advisory Guidelines calculation ought to play. I will consider more fully the role the Guidelines play in appellate review as elucidated by *Rita v. United States* and *Gall v. United States* in the below section on appellate review.[148] However, regardless of *Rita's* and *Gall's* effects on appellate review, district courts must determine what role the Guidelines ought to play in their sentencing determinations.

As a starting point, district courts must recognize that the advisory Guidelines range for each offense reflects the learned opinion of a commission of sentencing experts. Each advisory Guidelines range is the result of a process of careful deliberation by the Sentencing Commission, a process that takes into consideration the goals of sentencing set forth by Congress, pertinent policy statements, and years of federal sentencing practice.[149] Such considerable effort and careful study of sentencing is likely to result in sentences that, at least on a general level, reflect the seriousness of offenses and the appropriate sentence for any heartland offense.[150] To completely disregard such educated advice would clearly be an act of the most inappropriate of judicial activism.

For this reason, every court of appeals to have considered the question has required that district courts properly calculate a defendant's advisory Guidelines range as part of a proper sentencing determination.[151] In fact, that calculation is the first step in the

147. 18 U.S.C. § 3553(a)(4)(A)(i) (Supp. V 2005).

148. *See infra* Section IV.C.2.

149. Rita v. United States, 127 S. Ct. 2456, 2464 (2007).

150. *Rita*, 127 S. Ct. at 2465.

151. United States v. Hildreth, 485 F.3d 1120, 1127 (10th Cir. 2007); United States v. Trupin, 475 F.3d 71, 74 (2d Cir. 2007); United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006); United States v. Dorcely, 454 F.3d 366, 375 (D.C. Cir. 2006); United States v. Evans-Maritnez, 448 F.3d 1163, 1167 (9th Cir. 2006); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); United States v. Green, 436 F.3d 449, 455-56 (4th Cir. 2006);

sentencing process.[152] In properly calculating the Guidelines range, district courts recognize that legislative and administrative bodies retain an interest, not just in sentencing policy, but in the individual sentences doled out to offenders. This recognition reinforces the varied roles of legislators and judges in the sentencing arena. The Supreme Court further clarified this requirement in *Gall*, stating that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[153]

However, properly calculating the range is insufficient. If a district court were to properly calculate a range and then disregard that range without adequate explanation, it would fail to properly consider the role of Congress and the Sentencing Commission in the sentencing process. Therefore, while the advisory Guidelines range cannot be the *sole, determinative* factor in a defendant's sentence,[154] it ought to retain a special level of importance in the sentencing process.[155]

But the Supreme Court in *Gall* made it clear that the Guidelines are only one of the § 3553(a) factors to be considered when it stated:

> The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider

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United States v. Stone, 432 F.3d 651, 654-55 (6th Cir. 2005); United States v. Munoz, 430 F.3d 1357, 1369 (11th Cir. 2005); United States v. Hagan, 412 F.3d 887, 893 (8th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Mares, 402 F.3d 511, 518-19 (5th Cir. 2005).

152. *See* United States v. Rodarte-Vasquez, 488 F.3d 316, 324 (5th Cir. 2007); United States v. Grier, 475 F.3d 556, 608 (3d Cir. 2007).

153. 128 S. Ct. at 596.

154. *See* Hon. Nancy Gertner, Judge, D. Mass., The Phillip D. Reed Lecture Series Panel Discussion: Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges (October 2006), *in* 75 FORDHAM L. REV. 1, 7 (2006) (detailing how *Booker* prohibits district courts from using the Guidelines as the determinative factor in sentencing).

155. *See Jimenez-Beltre*, 440 F.3d at 518 ("At the same time, the guidelines cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a) (2000), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges . . . .").

> the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.[156]

In short, at the district court level, sentencing judges must carefully balance their role as arbitrators of individual cases against the roles that Congress, the executive branch (in the shape of a prosecutor), and the Sentencing Commission play. While discretion ought to be exercised, particularly when considering sentencing factors one through three, sentencing courts must give due regard to the experience and judgment of Congress and the Sentencing Commission. They may do so through serious consideration of factors four, five, and six.[157] In short, actual consideration of the § 3553(a) factors, as required by the United States Code, the United States Supreme Court, and every court of appeals, will result, in nearly all cases, in a sentencing process that properly balances the need for judicial discretion with the need to consider policies established by Congress and the Sentencing Commission.

2. *At the Appellate Level*

This need to strike an appropriate balance is not something that must be considered only at the district court level. Appellate courts, too, must determine the appropriate level of discretion. *Booker* mandated that appellate courts review district court sentences for "unreasonableness."[158] However, the contours of "reasonableness review" were not clear until the Supreme Court clarified them in *Gall*.

The Supreme Court took a first step toward defining reasonableness in *Rita*,[159] and in so doing recognized the important balance that must be struck between judicial discretion and congressional guidance. The presumption of reasonableness that *Rita*

156. 128 S. Ct. at 596-97 (internal citations omitted).

157. While factor seven—the need to provide restitution to the victim, 18 U.S.C. § 3553(a)(7)—also serves a role in balancing discretion and congressional intent, it is not a factor I take up in great detail here.

158. United States v. Booker, 543 U.S. 220, 260-61 (2005).

159. 127 S. Ct. 2456 (2007).

allows fits well within the model of guided discretion I have suggested. The Supreme Court recognized that a presumption of reasonableness reflects the nearly Herculean effort by the Sentencing Commission to create a sentencing system that properly weighs uniformity, proportionality, and numerous other sentencing goals.[160] But it does so in such a way as to retain judicial discretion:

> Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge. Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.[161]

This recognizes that both sentencing judges and the Sentencing Commission share a role in sentencing. "[B]oth the sentencing judge and the Commission carry[] out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."[162]

The Supreme Court further cemented the reasonableness jurisprudence in *Gall*.[163] It outlined a two-part approach: the first procedural and the second substantive. The procedural prong focuses on the court of appeals' review to ensure a proper Guidelines range calculation, the recognition that *Booker* made the Guidelines advisory, consideration of the § 3553(a) factors, not clearly erroneous factual findings, and an adequate explanation of the ultimate sentence imposed. The substantive prong then involves the review of the reasonableness of the sentence under an abuse-of-discretion standard. Here, a court of appeals may presume that a within-Guidelines sentence is reasonable. However, there is to be no presumption of unreasonableness or even a mathematically rigid proportionality principle that correlates numerically the amount of the trial court's justification with the amount of deviation from the Guidelines. At the same time, a court of appeals

160. *Rita*, 127 S. Ct. at 2464 ("The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate. They also reflect the fact that different judges (and others) can differ as to how to best reconcile the disparate ends of punishment.").

161. *Id.* at 2463.

162. *Id.* at 2464.

163. 128 S. Ct. 586.

"may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[164] It will be interesting to see how the courts of appeals apply *Gall* in the months and years ahead.

V. CONCLUSION

Booker has clearly wrought a new era in sentencing. Federal judges, once the receptacle of unfettered discretion, again retain discretion to sentence individual offenders based on individual determinations. However, that discretion must be properly exercised, balancing it against Congress' and the Sentencing Commission's interests in uniformity and proportionality in sentences. Therefore, federal judges should not use this newfound discretion to blaze new sentencing trails, but rather should always begin with the well-worn trails forged by the Sentencing Guidelines, branching out only when those trails lead to unjust results. To fail to do so could result in disparate sentences and, ultimately, legislative backlash that would strip the federal judiciary of its newly retrieved discretion. On the other hand, the result of properly guided discretion will be sentences that are apt for the crime and the offender, that consider congressional judgments, and that maintain the reduction of unwarranted sentencing disparities between defendants.

164. *Gall*, 128 S. Ct. at 597.